

# **The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs**

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Three years have passed since the Congress of 1996 imposed comprehensive restrictions on the Legal Services Corporation (LSC) and its lawyers who provide free representation to the nation's poor in civil legal matters. As legal services programs around the nation struggle to carry out their mission to provide high quality legal representation, the restrictions continue to cause real harm to the individuals and communities that rely on legal services lawyers. Injustices that cannot be addressed; clients who cannot be represented; precious funds raised through strenuous efforts that must be squandered on duplicative rent, furniture, and computers; and attorneys' fees that must be forfeited, are all the subject of this Paper.

In this Paper, I first describe my own experience as a legal services attorney in attempting to represent clients fully despite LSC's demand, based on the restrictions, that I either abandon them or forfeit my job. I then describe the circumstances of other legal services lawyers in Oregon,<sup>1</sup> Virginia,<sup>2</sup> and Florida<sup>3</sup> who are endeavoring to provide high-quality legal representation to their clients while complying rigorously with the requirements embodied in the restrictions. In assessing these stories, it is

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1. The section of this article describing legal services in Oregon is based on information provided by Ira Zarov, Executive Director, Oregon Legal Services-Multnomah County Legal Aid Service, Inc. (OLS-MCLAS), and Richard C. Baldwin, Executive Director, Oregon Law Center.

2. The section of this article describing Legal Services in Virginia is based on information provided by Alex R. Gulotta, Executive Director, Charlottesville-Albemarle Legal Aid Society (CALAS), and Robert S. Stevens, Executive Director, Piedmont Legal Services, Inc.

3. The section of this article describing Legal Services in Florida was authored by Peter Helwig, Executive Director, and Steve Hitov, Managing Attorney, Florida Rural Legal Services.

useful first to consider the scope of the restrictions and the response of LSC programs nationally following their enactment.

## I. THE SCOPE OF THE RESTRICTIONS

### A. *The Restrictions*

The restrictions prohibit LSC lawyers from handling voter redistricting claims, initiating legislative advocacy, initiating or participating in class actions, providing training to advance particular public policies, handling abortion-related litigation, representing incarcerated persons, representing certain aliens, challenging welfare reform legislation, defending public housing residents in certain eviction cases where substance abuse is alleged, claiming attorneys' fees, and soliciting clients.<sup>4</sup>

Congress made these restrictions applicable to all programs that receive LSC funds. Thus, legal services programs are forbidden to engage in the restricted activities regardless of whether such activities are supported with federal LSC funds, or with other non-LSC funds raised from sources such as state appropriations, attorney filing fees, private foundations, or other private donors.

### B. *The Program Integrity Regulation*

LSC, recognizing the force of constitutional challenges to the restrictions as applied to non-LSC funds, issued a "program integrity regulation" in 1997 that loosened the hold of the restrictions on non-LSC funds.<sup>5</sup> Under the regulation, an LSC program that wishes to use its non-LSC funds to engage in restricted activities may enter into a relationship with a non-LSC organization, which is then free to use the LSC program's non-LSC funds to conduct the restricted activities. So long as the LSC program retains "objective integrity and independence" from the affiliate organization, LSC will not penalize the LSC program for activities of the affiliate that would otherwise be subject to the restrictions.

To measure whether an LSC program has retained "objective integrity and independence" from the other organization, LSC considers whether the two organizations are "legally separate," whether the non-LSC organization received any LSC funds, and whether the organizations are "physically and financially separate." To measure whether the programs are "physically and financially separate," LSC considers whether the organizations have separate personnel, separate accounting and

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4. See Pub. L. No. 104-134 § 504(a)(1), (2)-(4), (7), (11)-(18) (1996).

5. 45 C.F.R. § 1610.8(a) (1998).

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timekeeping records, and separate physical facilities. LSC also considers whether the programs use adequate signs and other forms of identification to distinguish the organizations from each other. LSC also considers the extent of the restricted activities in which the non-LSC organization engages.<sup>6</sup>

### *C. Responses of Legal Services Programs to the Restrictions*

Following enactment of the restrictions, LSC required all programs to transfer or withdraw from cases in the categories prohibited by the restrictions. Press accounts at the time suggest that approximately 600 cases were disposed of in some way. While many cases were transferred to eligible counsel,<sup>7</sup> or brought by their legal services counsel to new settings where further representation was permitted, some cases did not find eligible counsel and were discontinued. In one conspicuous class action, the class was decertified and the case dismissed when a search for substitute counsel, conducted with the help of the American Bar Association's Pro Bono Institute, proved fruitless.<sup>8</sup>

Two comprehensive lawsuits were ultimately filed against LSC challenging the restrictions on constitutional grounds—one seeking complete rescission of the restrictions<sup>9</sup> and the other seeking rescission of the restrictions as applied to non-federal funds.<sup>10</sup>

As an alternative to withdrawing from representation in matters prohibited under the restrictions, some legal services lawyers filed motions seeking judicial orders to clarify whether they were obligated to withdraw or to continue as counsel.<sup>11</sup> Part II of this Paper sets forth my own story as a legal services lawyer who was the subject of a series of such motions filed in cases pending in New York State.

Two legal services programs sought to preserve their ability to handle restricted matters by establishing affiliate relationships with non-LSC programs pursuant to LSC's program integrity regulation. This Paper, in Parts III and IV, sets forth the stories of these two programs which are located in Oregon and Virginia. Both programs describe tremendous

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6. *See id.*

7. For example, Florida Rural Legal Services was able to transfer some cases to the ACLU Foundation of Florida. *See infra* note 45.

8. *See Dugas v. Hoffpauir*, No. Civ. A. 93-1699, Memorandum Order (W.D. La., Oct. 24, 1996).

9. *Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 981 F. Supp. 1288 (D. Haw. 1997), *aff'd*, 145 F.3d 1017 (9th Cir. 1998), *cert. denied*, No. 98-296, 1998 U.S. LEXIS 7588 (Nov. 30, 1998).

10. *See Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997), *appeal argued* Mar. 20, 1998.

11. *See, e.g., Varshavsky v. Perales*, No. 40767/91, slip op. (Sup. Ct. N.Y. County, Dec. 24, 1996).

burdens encountered in complying with the restrictions and the criteria in the program integrity regulation.

Many legal services programs have been limited to handling only those matters still permitted under the restrictions. Some operate under statewide networks in which other organizations supported with non-LSC funds are attempting to handle restricted work. Some operate in states in which there are no other unrestricted organizations possessing non-LSC funds. In Part V, this Paper explains how Florida Rural Legal Services, an organization funded exclusively by LSC, has sought to provide high quality representation while complying fully with the restrictions. Florida Rural's report illuminates the problems that the restrictions present even in a state in which an independent "companion delivery system," supported with non-LSC funds, attempts to handle matters that would be prohibited under the restrictions.

## II. NEW YORK

My own experience illuminates certain deeply troubling aspects of the restrictions. When the restrictions were enacted in 1996, I was an attorney at Legal Services for the Elderly,<sup>12</sup> in New York City, serving as lead counsel in four class action suits. LSC initially took the position that my continued role as counsel in each case was barred by the restriction that prohibits "initiating or participating in a class action."<sup>13</sup> In three of these cases, my role at the time was minimal, but not unimportant; I was monitoring implementation of final remedial orders that years earlier had resolved the merits of the claims. In the fourth case, the merits had not yet been resolved and trial was scheduled.

The three cases in the implementation phase were all class action suits against the Social Security Administration (SSA). The first case, *Kendrick v. Sullivan*,<sup>14</sup> had been brought by disabled and elderly Social Security applicants and recipients who alleged that a particular Administrative Law Judge was unfit and biased against all Social Security claimants. A formal settlement of this case, approved in 1996, called for SSA to reopen all adverse Social Security decisions that the judge had rendered since her appointment in 1977.

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12. Legal Services for the Elderly (LSE) receives LSC funds through Legal Services for New York City (LSNY), an umbrella organization that in turn receives funds from LSC. LSE also receives substantial non-federal funds. My salary at LSE was funded entirely by revenues from a New York State appropriation supporting advocacy on behalf of Social Security claimants.

13. Pub. L. No. 104-134 § 504(a)(7) (1996).

14. 784 F. Supp. 94 (S.D.N.Y. 1992) (certifying class and denying motion to dismiss), *subsequent settlement sub. nom.*, *Kendrick v. Shalala* (unpublished).

The second case in the implementation phase, *New York v. Sullivan*,<sup>15</sup> had been brought by a similar class of disabled plaintiffs who challenged SSA's disability rules on the ground that they placed excessive reliance on the results of "treadmill tests" when determining disability based on ischemic heart disease. A district court order granting summary judgment to the plaintiffs, affirmed on appeal, required the agency to reopen all denials and terminations of class members' benefits.

The third case in the implementation phase, *Stieberger v. Apfel*,<sup>16</sup> was brought by Social Security claimants who alleged that SSA's policy of "non-acquiescence"—the agency's systematic disregard for circuit court holdings (in this case, Second Circuit disability holdings)—had caused class members' benefit claims to be unlawfully denied and terminated. A formal settlement of this case called for the agency to reopen many thousands of benefit decisions and to implement a system to require agency decisionmakers to follow Second Circuit holdings.

In the fourth case, *Robinson v. Chater*,<sup>17</sup> the merits were still at issue when the restrictions were enacted. The plaintiffs in *Robinson* were disabled and elderly people who were in desperate circumstances because of the failure of SSA and Treasury to replace vital benefit payments (in some cases amounting to thousands of dollars) that had been lost, stolen, or destroyed. The plaintiffs alleged that SSA and Treasury were engaging in outrageous delays when responding to their claims for replacement of missing benefit payments. Many had been waiting for several years. When the restrictions became effective, the case had been scheduled for trial.

Although LSC insisted that my office immediately discontinue all involvement in class actions, I submitted a "conditional motion to withdraw" to each court, pursuant to the courts' local rules,<sup>18</sup> rather than simply abandon my duties to my clients. In the motions, I requested rulings on the constitutionality of the restrictions, explaining that if the restrictions were determined to be constitutional, then I would request leave to withdraw, but also explaining that if the restrictions were found unconstitutional then withdrawal would be inappropriate as it would prejudice my clients.

Although I submitted each motion in advance of the August 1, 1996 effective date of the restrictions, LSC paid little heed to my efforts to obtain judicial rulings. Instead LSC continued to insist that any continued

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15. 906 F.2d 910 (2d Cir. 1990).

16. No. 95 Civ. 5622, 1998 WL 556156 (S.D.N.Y. Aug. 31, 1998).

17. No. 94 Civ. 0057, 1996 WL 5067 (S.D.N.Y. Jan. 5, 1996).

18. General Rules, United States District Court for the Southern District of New York, Rule 3(e) (requiring counsel seeking withdrawal to obtain leave of the court).

involvement in the cases on my part violated the restrictions. While the motions were still pending, LSC notified LSNY<sup>19</sup> of "a preliminary determination" to suspend all funds for LSC programs in New York City as of September 1, 1997 as a consequence of my, and my colleagues', role in these and three other cases.<sup>20</sup> LSNY then notified my office that it would fire all of our employees.<sup>21</sup>

Following these deeply disturbing threats, my motions and LSC's response to them led to the following surprising resolutions. In the three cases in which the merits had been resolved, LSC simply backed down. Although the class action restriction expressly prohibits "initiating or participating" in class actions, LSC explained that its implementing regulation carves out a "safe harbor" for LSC lawyers whose involvement in class actions is "non-adversarial."<sup>22</sup> In each of the three resolved suits, LSC sent me a formal letter acknowledging that my monitoring role fell within this safe harbor. On this basis, I was able to continue as counsel in all three cases. Unfortunately, LSC's safe harbor regulation was not promulgated until August 13, 1996, and thus many advocates across the country withdrew prematurely from analogous cases in which they served as class counsel, based on the belief that withdrawal was required.<sup>23</sup>

While the safe harbor regulation solved the immediate crisis in these three cases, it ultimately turned out to provide little in the way of real security. After LSC issued its letter acknowledging that my role in *Stieberger*, the nonacquiescence case, was within the safe harbor, I subsequently brought to the court's attention the SSA's circulation to employees of a document that I believed violated the settlement. The document seemingly instructed agency employees to disregard Circuit Court precedents. The defendant's counsel (a lawyer in the federal programs branch of the Department of Justice) reported my action to LSC. LSC then declared that my letter to the court was "adversarial" and ordered me off the case on pain of defunding all legal services programs in New York City, even though the merits of the underlying case had been resolved years earlier. Following a conference with the court, with LSC entering an appearance, the dispute over the settlement's implementation was resolved by stipulation, with the court observing that there was

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19. LSNY is the umbrella organization for all LSC funded programs in New York City.

20. See *Today's News*, N.Y. L.J., Aug. 14, 1996, at 1.

21. See *Today's News*, N.Y. L.J., Aug. 15, 1996, at 1.

22. 45 C.F.R. § 1617.2(b)(2) (providing that "Initiating or participating in any class action does not include . . . non-adversarial activities").

23. See Legal Services Corporation, 61 Fed. Reg. 41,963 (1996) (interim rule, effective Aug. 13, 1996), modified by 61 Fed. Reg. 63,754 (1996) (final rule, effective Dec. 2, 1996) (to be codified at 45 C.F.R. § 1617). The text of LSC's interim and final rules does not clearly define the boundaries of the safe harbor. LSC's agreement to permit continued monitoring was obtained in negotiations to settle the conditional motions to withdraw.

no actual adversarial dispute between the parties. LSC insisted that my pay be docked for my court appearance, but then permitted me to resume my monitoring role, again, in light of the non-adversarial resolution of the matter and the safe harbor regulatory provision.

The controversy concerning the fourth case, *Robinson*, could not be resolved by reliance on the safe harbor provision since the merits were still in dispute and the case was scheduled for trial. LSC demanded that I either abandon the case altogether or assume part-time status to handle the matter elsewhere without LSC resources. The court provisionally granted my conditional motion to withdraw, ordering me removed from the case temporarily but reserving the right to reinstate me as counsel if no substitute could be found before the upcoming trial.

At a subsequent conference, the remaining counsel on the case informed the court that the only substitute willing to take the case would need to request an adjournment to prepare for the trial.<sup>24</sup> The court then ordered me back on the case, but declined to bar LSC from taking action to sanction me or my colleagues in legal services offices across the city. Since the court had both ordered me to continue as counsel and declined to protect me from retaliation by LSC, I had no choice but to accept part-time employment on LSC's terms.<sup>25</sup> LSC flatly refused my proposal to handle the case on accrued vacation time, which would have permitted me to avoid assuming part-time status. LSC instead took the position that the restrictions applied to me so long as I was employed in my legal services office as a full-time attorney. As a result I assumed part-time status, accepted a cut in salary, accepted a cut in the rate at which I would continue to accrue annual leave time, accepted the risk that LSC (or LSNY) might object to my eventual full-time reinstatement, and proceeded to handle *Robinson* as a volunteer working out of office space donated by a local law school. This difficult arrangement forced me to split my time between my legal services office and the law school clinic.

Eventually, *Robinson* was settled on the eve of trial on terms favorable to the plaintiffs.<sup>26</sup> As soon as the court preliminarily approved the

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24. Co-counsel in the case—the Greater Upstate Law Project (GULP), a program that declined further LSC funding when the restrictions were enacted—stated that additional counsel was essential in *Robinson* for a variety of reasons, including the complexity of the case and GULP's distance from New York City. The Legal Aid Society of New York appeared in court and stated that, if an adjournment were granted, it would undertake representation in conjunction with pro bono counsel.

25. A separate conditional motion to withdraw, filed by my LSE colleague, Valerie Bogart, in a separate case, *Varshavsky v. Perales*, led to a different result. The court in that case directed Ms. Bogart to remain on the case and enjoined LSC from taking any punitive action until the motion could be fully adjudicated. Ultimately, the *Varshavsky* court declared the restriction on class actions unconstitutional as applied to Ms. Bogart. See *Varshavsky v. Perales*, No. 40767/91, slip op. (Sup. Ct. N.Y. County, Dec. 24, 1996).

26. The settlement agreement provided for the Treasury and SSA to employ new proce-

proposed settlement in *Robinson*, I notified LSC that the case had entered a non-adversarial posture and explained I was eligible for reinstatement as a full time LSE employee under the safe harbor provision. I then returned to full-time status. However, once again, the safe harbor proved insecure. I made the "mistake" of writing to the court to resolve a minor dispute over the date on which notice of the *Robinson* settlement should be mailed to the class members and over the notice's content. The government's lawyer (an Assistant United States Attorney in the Southern District of New York), sent my letter to LSC. LSC then cited the "dispute," slight as it was, as reason again to find that I was engaging in "adversarial" activity in violation of the class action restriction. LSC again ordered me to withdraw from the case on pain of defunding all legal services programs in New York City. LSC relented only after receiving letters from the district court judge and a supervisor in the U.S. Attorney's office, both explaining that there was no genuine adversarial dispute. Eventually the court approved the case settlement.

Several themes emerge from these chaotic proceedings. First, while LSC—when pressed—will permit attorneys to monitor implementation of class action remedial orders, LSC's seeming toleration of this work actually provides little real security. At any turn, an adversary may knock the LSC lawyer off the case by reporting to LSC that the lawyer is engaged in adversarial activities, even if the merits are fully resolved and the dispute is over scheduling or other details.

More troubling is the threat of such an attack when the LSC lawyer catches and reports an opposing party's genuine non-compliance with a final remedial order. LSC, which must answer to a frequently hostile Congress, has a hair trigger in such matters and may demand that an LSC lawyer withdraw from a case even if, as noted above, the merits are fully resolved and the dispute is solely over compliance with the court's order. Since it is very difficult to find substitute counsel willing to inherit the complex responsibility of monitoring a resolved past suit, and since many legal services offices have played an essential role as monitors of remedial orders in such cases, the chilling effect of the restrictions on class action monitoring is especially problematic.<sup>27</sup>

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dures so that, when New York claimants request replacement of missing Social Security payments, they will no longer have to wait for the completion of the government's lengthy investigative proceedings before receiving replacement of their missing payment. Under the new settlement procedures, the government will issue the replacement payment before beginning the investigation. After the replacement payment is issued, the government will conduct its investigation and will later seek reimbursement if it determines that the claimant did not deserve the replacement payment.

27. LSC's actions have been chilling in other respects. For example, LSNY has so far sought to hold my Legal Services employer, LSE, responsible for attorneys' fees expended by LSNY in defending the motions I filed, even though those motions asserted fundamental consti-



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LSC has recently persuaded the United States Court of Appeals for the Ninth Circuit in *Legal Aid Society of Hawaii* that the part-time employment arrangement in *Robinson* somehow demonstrates that LSC will apply its “program integrity regulation” in a flexible manner and will make careful case-by-case determinations as to whether any particular sharing arrangement violates the requirement of “physical and financial separation” set forth in the regulation.<sup>28</sup>

But such a conclusion is not justified—in fact LSC seems wed to rigidly applying the regulations. Nor is part-time employment a viable administrative option for LSC programs since part-time employees have reduced health, pension, vacation rights, salary, and overall job security, and LSC forces them to operate out of physically separate offices. When part-time employment occurs in a separate office, as the LSC program integrity regulation requires, it becomes much more difficult for lawyers to provide effective representation. For example, telephone messages must be returned from separate locations; clients only can be seen and represented on certain days; time is wasted on travel between offices; collegial duties must go unmet. Even if part-time employment could provide a marginally acceptable solution where counsel is handling a single specific case during a specific segment of time (as in *Robinson*), the burdens become much more unbearable where counsel is responsible for multiple matters. While part-time employment served as a stop-gap measure to resolve a distracting crisis in *Robinson*, it does not offer a programmatic solution and does not demonstrate that LSC will apply its program integrity regulation in ways that are genuinely flexible. LSC has not shown any willingness to relax the program integrity requirement of physical separation. In *Robinson*, LSC’s insistence on this requirement was absolute.<sup>29</sup>

Finally, the arrangement in *Robinson* was one between an LSC-funded office and an entirely separate law school clinic. The LSC program had no control over the litigation of the case and no opportunity to preserve its First Amendment rights through the arrangement. LSC’s actions in *Robinson* also do not suggest that LSC would tolerate any greater overlap between organizations that share a part-time employee

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tutional rights, even though three of the motions were settled on terms that allowed me to continue as counsel for my clients, and even though the fourth motion led to a court order requiring me to continue as counsel.

28. See *Legal Aid Soc’y of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998) (indicating the court’s reliance on an affidavit from LSC’s general counsel describing my part-time arrangement in *Robinson*).

29. Nor did my employer, LSE, possess sufficient resources to enable it to decline LSC funding or to finance the litigation out of a separate office as contemplated under the program integrity regulation.

engaged in restricted work in one organization and unrestricted work in the other organization.

### III. OREGON<sup>30</sup>

The LSC restrictions have imposed difficult burdens on the programs that provide legal representation to Oregon's poor. These programs operate with seriously understaffed offices, an urgent need for additional funds, and the recognition that the restrictions prevent many forms of advocacy that in previous years proved essential to fully protecting clients' rights.

#### A. History

Before 1996, each of the fourteen offices of Oregon Legal Services (OLS) did work that is now prohibited. Advocates routinely sought attorneys' fees, undertook class actions, lobbied administrative agencies and local governments, challenged welfare laws, and represented undocumented workers. The Oregon Legal Services philosophy, recorded in the program's statement of principles, had always been for attorneys to handle a significant number of individual cases while also taking on projects with a broader impact on clients. Under this directive, fully a third of the work focused on legal reform, leaving a significant legacy of cases.

For example, in the past, Oregon Legal Services was responsible for writing and lobbying the Family Abuse Prevention Act, which provides protection to victims of domestic violence, and for ensuring enforcement of that Act through the courts. OLS represented the Oregon Coalition Against Sexual and Domestic Violence in the legislature and also represented the interests of United Seniors. On a local level, OLS frequently represented clients and client groups in local government forums, arguing "not in my backyard" (NIMBY) issues that arose around development and placement of low-income housing. For example, OLS successfully lobbied Congress to obtain formal recognition of Indian tribes that had been "terminated" in the 1950s. This effort enabled many tribes to become self-governing and economically self-sufficient.

OLS also routinely worked with the state's service providers to design adequate rules on a wide range of topics. Especially important exchanges gave rise to rules to facilitate adoptions by low-income families, rules concerning the implementation of Oregon's health plan, and rules concerning the operation of work-fare and other related programs.

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30. Information for this Part was provided by Ira Zarov, Executive Director, Oregon Legal Services-Multnomah County Legal Aid Service, Inc., and Richard C. Baldwin, Executive Director, Oregon Law Center. See *supra* note 1.

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OLS also litigated numerous class actions, including a case that challenged the state's failure to provide emergency psychological treatment to eligible children. As a result of this lawsuit, several million dollars were added to the state's Medicaid expenditures to develop new programs for disturbed children.

In another class action, OLS represented a class of low-income Hispanics against the Farmers Home Administration alleging that the agency was improperly applying its loan criteria to class members and, as a consequence, denying loans to eligible applicants. The settlement of this lawsuit resulted in the infusion of millions of dollars in federal funds for housing for class members. The settlement was monitored for a substantial number of years.

Other class actions included challenges to the state's method of determining eligibility for Medicaid, challenges to the Immigration and Naturalization Services' processing of a category of citizenship applications, numerous class actions concerning wages and working conditions of migrants, and class actions against perpetrators of consumer fraud. In one consumer fraud class action, the last such action filed and completed prior to the restrictions, the challenged practice was an automobile "loan, lease-buy back" scheme, directed at low-income individuals and the elderly, that extracted loan interest payments of over 200% per year.

When it became clear that the LSC restrictions would be enacted, the Oregon State Bar formed a task-force to examine potential responses. Following the recommendations of the Bar's Taskforce Report, non-federal funds formerly received by LSC programs statewide were directed to establish a new organization, the Oregon Law Center (OLC). The Center, located in Portland, is now the only office that has as its focal point the systemic reform work prohibited under the LSC restrictions.

On July 1, 1998, Oregon Legal Services (which had already consolidated with another LSC recipient, Multnomah County Legal Aid Service) changed its name to Legal Aid Services of Oregon (OLS-MCLAS) and formally affiliated with the Oregon Law Center. The affiliation's keystone was compliance with both the letter *and spirit* of LSC's "program integrity regulation."<sup>31</sup> The two programs share a board of directors, though the boards have separate officers. They do not share staff or office space. The Oregon Law Center receives no federal funds.<sup>32</sup>

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31. 45 C.F.R. § 1610 (1998).

32. Also providing federally funded Legal Services in some of Oregon's smaller communities are Marion-Polk Legal Services, Inc., and Lane County Legal Services, Inc. Additionally, the Center for Non-Profit Legal Services is a small, privately-funded provider of legal services in Medford, Oregon.

*B. Current Concerns*

In contrast to many states, substantial private and state funds have been found in Oregon to support OLC's unrestricted work. Nevertheless, the money does not begin to reach the levels necessary to continue all the work historically done by Oregon Legal Services or to establish the network of offices maintained by Oregon Legal Services. Despite the success of Oregon's legal services community in fundraising, no one considers it feasible to raise funds sufficient to establish such a network. Oregon Legal Services' budget last year for the maintenance of thirteen offices was approximately \$4.5 million and the budget for Multnomah County Legal Aid Services was \$1.5 million. Funding for the unrestricted work of the Oregon Law Center this year is only about \$900,000.

The shared board of directors now establishes a link between the restricted federally funded offices of OLS-MCLAS that are distributed around the state and the unrestricted privately funded office of the Oregon Law Center in Portland. Still, the board and the staff believe that any further overlap might violate LSC's rules and endanger program funding.

Any assessment of legal services in Oregon should consider both Oregon's tradition of providing free high quality legal representation and the program integrity regulation which, because of the requirement of physical separation, prevents the delivery of such representation to individuals living outside of Portland. It is clear that the difference in service provision since enactment of the restrictions is stark. Consider, for example, the legal needs of the residents of Ontario, Oregon, located east of Boise, Idaho—a full time zone from Portland. The indigent population of Ontario includes many undocumented migrant workers. OLS-MCLAS, the only legal services provider within a radius of almost 200 miles (three hours by car), has either two or three lawyers in its Ontario office, depending on funding. The Oregon Law Center currently has insufficient funds to establish an unrestricted legal services office in Ontario. As a consequence, an undocumented worker with a housing problem, or trouble with a grower, has no one to represent him or her. Similarly, as welfare reform sweeps across Oregon, no one in Ontario can do an intake or take a lawsuit for a welfare applicant seeking reform on any aspect of the law. When disputes about where to place a sanitation plant or a transitional residence for the mentally ill arise, OLS-MCLAS advocates cannot so much as approach the city council or county commissioner that controls such matters.

Even if funding were sufficient to allow "pairing" of offices, with the Oregon Law Center taking over some of the OLS-MCLAS offices, and with the other OLS-MCLAS offices remaining entirely funded by LSC (and subject to the restrictions), such an approach would fail to represent

adequately Oregon's poor because of the vast distances between towns.<sup>33</sup> For example, Ontario is a three- to four-hour drive from the nearest towns of Pendleton or Bend. The rest of the state poses the same problem. In the past, each federally funded office of Oregon Legal Services dedicated a certain amount of non-federal funding to unrestricted work. Given the "physically separate" mandate, it remains crucially important for the Oregon Law Center to raise more money to extend its service to other parts of the state. In addition, total available funds for the provision of legal services are diluted because the parallel organizations must each pay for duplicative management services, including executive directors, accounting units, program administrators, auditing services, and more.

The state's new plan for indigent representation calls for the Oregon Law Center to receive referrals from around the state, including from regions like Ontario. The hope is that the staff at OLS-MCLAS and the staff at the Oregon Law Center will see themselves as part of one larger organization. Nevertheless, because the staff inhabit segregated offices, the leadership of OLS-MCLAS and of the Oregon Law Center remain concerned about whether it is possible to ensure adequate communication between programs. Oregon Legal Services used to conduct a series of strategic meetings each year before the state legislative session. The program would include many people from many different offices in a coordinated effort to set priorities. Now, in light of the split, the annual strategy session involves only the Portland staff of the Oregon Law Center. While OLC tries to reach out to the satellite offices of OLS-MCLAS to discern the priorities of remote communities, it is impossible to sustain the level of involvement and excitement that was characteristic of the legislative advocacy effort that preceded enactment of the restrictions. Most perturbing is the possibility that over time the relationships between those doing legislative advocacy for the Oregon Law Center and those in the field offices of OLS-MCLAS and other programs may be attenuated still further. Breakdowns in communication are difficult to prevent when face-to-face meetings are infrequent and when advocates understandably are anxious to avoid interactions that could be perceived as violating the restrictions.

OLS-MCLAS recognizes that technological advances can help address some problems posed by underfunded and understaffed offices, a large client base, and vast distances. Videotelephones, hotlines, pro se centers, and other devices all have great promise, especially for handling simple matters or for advising clients on how to help themselves when

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33. Oregon has two major mountain ranges that run north-south through the state making winter travel difficult and dangerous.

self-help is an option. Still, none of the technological advances are a real substitute for the vigorous lawyering that OLS-MCLAS advocates historically offered. OLS-MCLAS strongly believes that to be effective, it remains crucial to have a presence in the community: clients need a place to meet, and advocates need to participate directly in issues confronting the community.

Finally, OLS-MCLAS is concerned about the long-term potential for morale problems. While OLS-MCLAS staff are devoted to providing effective representation to their clients, it is increasingly demoralizing for staff to confront the many critical opportunities for client advocacy that are now completely precluded. In the past, Oregon Legal Services advocates, on behalf of their clients, had an important say in the affairs of the community. Now this access and influence has been severely curtailed. OLS-MCLAS also must be increasingly concerned about whether these limitations on the practice of law eventually will make it difficult to attract and retain attorneys.

#### IV. VIRGINIA<sup>34</sup>

The LSC program in Charlottesville, Virginia was the first in the nation to enter into the arrangement of "physical and financial separation" that is contemplated in LSC's program integrity regulation. This section focuses on documenting the costs—direct and indirect, financial and human—that any LSC program must confront in seeking to satisfy this regulation.

When the LSC restrictions were enacted, long-time LSC provider Charlottesville-Albemarle Legal Aid Society (CALAS) embarked on the following plan to preserve its capacity to engage in unrestricted advocacy. CALAS declined receipt of further LSC funds. At the same time it fostered formation of Piedmont Legal Services, a new organization with staff previously employed by CALAS, to apply for the LSC funds that would otherwise have gone to CALAS. LSC authorized the funding of Piedmont for one year. Piedmont, as a new recipient of LSC funds, became subject to the LSC restrictions. CALAS did not. Piedmont and CALAS share a single board of directors.

##### *A. Basic Terms of the CALAS-Piedmont Affiliate Relationship*

While CALAS and Piedmont share a single board of directors, they are separate in almost all other respects. Each organization is a separate

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34. Information for this Part was provided by Alex R. Gulotta, Executive Director, Charlottesville-Albemarle Legal Aid Society (CALAS), and Robert S. Stevens, Executive Director, Piedmont Legal Services. See *supra* note 2.

## Legal Services Restrictions

tax entity and has its own executive director. The organizations share no case-handling staff. CALAS employs four and one-half attorneys, one and one-half paralegals, and two support staff. Piedmont employs two and one-half attorneys, one paralegal, and a part time support person. Each organization maintains its own accounting and timekeeping records and separate office space. Piedmont is in a building around the corner from CALAS. The offices are on separate computer networks.

### *B. The Costs Involved in Establishing and Maintaining the Affiliate Relationship*

#### *1. Time and Energy*

The costs imposed by the LSC restrictions and by the task of compliance with the program integrity regulation are substantial even if not easily quantifiable. Certain financial expenses are known, such as duplicative payments of rent and machine repair. More difficult to quantify is the effort involved in setting up and operating within the new affiliate relationship. The following examples help illuminate some of the costs.

Creating the new affiliate relationship required a huge time commitment from staff at both organizations. The process took almost a year. During this extended period the executive director of CALAS, and the CALAS attorney who later became executive director of Piedmont, dedicated substantial time to this process that otherwise would have been committed to handling substantive work for clients.

For example, the directors had many conversations with employees of LSC in Washington, D.C. to gain an unofficial sense of whether LSC would likely approve the proposed arrangement. Substantial staff time was also necessary to establish Piedmont as a separate 501(c)(3) non-profit corporation, though local lawyers donated some time to this task. It also took time to conduct the lengthy negotiations necessary to preserve health insurance, seniority, and pension rights for the Piedmont employees.

The executive director of Piedmont expended considerable time ensuring that Piedmont would be in full compliance with the LSC restrictions and all other requirements including the program integrity requirement. Simply compiling the relevant statutes and regulations, learning their content, and establishing office policies took thirty to forty hours.

The process of creating Piedmont was also emotionally wrenching. CALAS had to decide which members of a close-knit staff should go to the new organization. Difficult choices had to be made about who would

do restricted or unrestricted work and about the best way to divide up the categories of legal work. Extensive discussions led to a decision to handle all family law and bankruptcy cases at Piedmont since that office was barred from collecting attorneys' fees and such cases generate relatively few fee claims. But despite some advantages, CALAS and Piedmont do not find the arrangement entirely satisfactory since Piedmont lawyers cannot engage in legislative advocacy that is sometimes quite important to their clients' cases.

## 2. *Money*

Piedmont's new computer network cost about \$10,000. The existing server at CALAS could have served both Piedmont and CALAS, but the programs chose not to share the server because of concern about satisfying LSC's program integrity regulation. CALAS and Piedmont both believed that LSC would have found shared reliance on a single computer network to be a violation of the requirements of physical separation. Expense also was incurred when CALAS had to buy new furniture and equipment after donating a substantial amount of existing furniture and equipment to Piedmont pursuant to an LSC ruling that authorized such donations.

In establishing Piedmont, CALAS paid Piedmont's employees the amount representing their accrued leave time as indicated in CALAS's books. Absent the need to establish the new affiliate relationship, this amount would have remained on CALAS's books and been payable only when the staff eventually left the employment of CALAS. Thus, while these payments did not constitute a new financial liability, their payment as lump sums was necessitated solely by creation of the new affiliate relationship.

The two physically and financially separate offices generate additional administrative work and cost, including the substantial expense of salaries for two executive directors.

Piedmont was required to purchase new case management software. This expense was relatively modest because the software was discounted dramatically by its creator (John Kemp), who reduced the fee (from \$1700 to \$200) to support Piedmont's creation.

CALAS was forced to forego claiming approximately \$25,000 in attorneys' fees in one case last year solely because of the LSC restrictions that bar LSC programs from collecting fees. The fees were a product of CALAS's successful litigation in a consumer law case. When plaintiffs prevailed, CALAS was barred from collecting its statutory attorneys' fees as the separation had not been completed. In another case now pending, Piedmont is serving as co-counsel with CALAS since the clients



## Legal Services Restrictions

had been working with a CALAS attorney who moved to Piedmont, and they wanted to continue this relationship. If the case goes to trial and the plaintiffs prevail, the work by Piedmont will likely generate \$10,000 to \$20,000 in fees that it will be forbidden to collect.<sup>35</sup>

Rent is probably the most wasteful aspect of maintaining dual offices. Piedmont was fortunate to obtain a \$1000 per month lease. Inexpensive for the Charlottesville area, this \$12,000 per year cost nevertheless is occasioned solely by the "physical separation" requirement. Piedmont and CALAS, based on their negotiations with LSC, concluded it was essential for the two programs to have entirely separate offices with separate entrances and no sharing of keys. The cost of telephone service at Piedmont's separate office included approximately \$3000 for an initial hook up and includes an additional \$2500 each year.

Piedmont employs its own receptionist because of the physical separation requirement.

Piedmont and CALAS each pay for separate audits that each year cost \$3500 per program. Before the forced separation, only one audit was necessary for a total cost of \$4000.

### 3. *The Future*

While Piedmont and CALAS would benefit enormously from sharing computers, office space, and staff, the organizations have concluded that such an arrangement is entirely out of bounds from LSC's perspective. The degree of separation in the final arrangement between CALAS and Piedmont reflects months of deliberation with frequent efforts to obtain LSC's feedback and approval. Thus, the final arrangement reflects LSC's deliberate input, and neither program anticipates creating any additional overlap.

CALAS and Piedmont have tried to spend their limited resources, particularly the restricted federal LSC funds, as rationally as possible. Thus, the offices divide the categories of work so that Piedmont handles the cases least affected by the attorneys' fee restriction: family court and bankruptcy cases. Piedmont also runs a pro bono intake hotline staffed by volunteer lawyers for four half-days each week. The hotline refers to CALAS such cases as federally subsidized housing evictions, denials of federally subsidized housing, representation of tenant organizations, public benefits cases, special education cases, employment discrimina-

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35. The case is a lawsuit against a car dealer who sold a car based on the representation that the car had been driven 73,000 miles instead of 173,000. The car dealer took advantage of certain intellectual limitations of the buyers, a married couple who are now the clients of CALAS-Piedmont.

tion, migrant worker representation, consumer law cases, and representation of juveniles with legal conflicts. CALAS has also obtained certain new grants that have helped it meet its expenses. One grant provides for CALAS to represent juveniles. Another, funded with IOLTA (Interest on Lawyers' Trust Accounts) revenues, provides \$95,000 for migrant representation. CALAS also has received a grant in collaboration with the Public Service Center at the University of Virginia School of Law to handle special education cases and other child advocacy matters. CALAS also is involved in an employment clinic program at the law school. While these grants and programs have been important in sustaining the critical mass of the organization, CALAS notes that the specialized purpose of the funds also means the office does less work in the traditional areas of housing and consumer law.

CALAS presently continues to engage in legislative advocacy, particularly over tenants' issues. CALAS seeks and collects attorneys' fees in cases where fees are available. CALAS is also considering undertaking certain class actions. When the restrictions were enacted, attorneys at CALAS were in the investigation stage of two potential class actions. In light of the enactment of the restrictions, CALAS settled both cases before filing. While CALAS considers the two settlements fair for the individual plaintiffs, it notes that the intense pressure to avoid handling cases in violation of the LSC restrictions precluded lawyers from further developing potential claims on behalf of the possible class.

Both CALAS and Piedmont have found it is difficult to fund-raise for many categories of legal services work (for example, housing or consumer law cases). However, a state appropriation—a filing fee of \$2.00 per case that goes to legal services programs—and IOLTA funds have all been enormously important in sustaining CALAS. The appropriation from the state, however, has been modified over the years and has in some years been dropped from the state budget. Significant segments of the state are not particularly sympathetic to the need for legal representation for the poor. Recently a law firm has raised questions at the state bar association concerning CALAS's role in suing a car dealer that is the firm's client. The firm also made inquiries on behalf of a poultry processor about CALAS's migrant program.

The overall lack of funding for legal services in Virginia, and the waste of funds on duplicative expenses, compounds the harm caused by the restrictions. At both Piedmont and CALAS, support staff is in short supply. It has also become much harder for programs to attract young attorneys and to retain experienced ones. In Charlottesville the starting Legal Services salary is \$24,700 while a public defender can earn up to \$31,000 and a prosecutor up to \$35,000. Experienced attorneys find it in-

## Legal Services Restrictions

creasingly difficult to support families when funding streams are under constant attack and seem inherently unstable.

CALAS and Piedmont believe that most other legal services programs would not be interested in seeking to establish an affiliate relationship based on the CALAS-Piedmont example even though no lawyer is comfortable operating under the restrictions. While CALAS was able through tremendous sustained effort to create and then affiliate with Piedmont, it is plainly easier and less expensive for a single office program like CALAS to duplicate itself than for other programs with multiple offices to do so.

Other options for dedicating non-LSC funds to unrestricted work also are unattractive. Programs are free to transfer their non-LSC funds to other organizations, such as CALAS, or even the Virginia Poverty Law Center in Richmond. The problem is that after any such transfer, unrestricted services will remain geographically inaccessible to clients in the original service area where they are needed. Programs also are free to decline LSC funding altogether (without necessarily entering into any affiliate relationship). Of course, surviving as an independent program involves many of the same financial costs and risks incurred in creation of affiliate relationship (as with CALAS-Piedmont) and poses the additional risk that over time the programs under separate management will compete for funding.

Finally, the instability of funding for civil legal services also causes many programs to hesitate before undertaking plans for dramatic reorganization. While federal funds have remained available at a reduced survival level, and while Virginia has been generous compared to some states in providing unrestricted money, the overall funding flow has not been sufficiently reliable, especially in certain regions, to assure that programs can meet ongoing expenses even if there could be enough start-up money to establish "physically separate" programs.

## V. FLORIDA<sup>36</sup>

With the benefit of two years' experience under the new restrictions, it is clear that the LSC restrictions have had a profound effect on the system of civil justice for the poor throughout this country and on the range of options that Florida Rural Legal Services (Florida Rural) can offer to its clients. Cases will arise, and have already arisen, where the most appropriate remedy, and perhaps the only meaningful one, is now proscribed.

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36. Peter Helwig, Executive Director, Florida Rural Legal Services, and Steve Hitov, Managing Attorney, Florida Rural Legal are the joint authors of this Part. *See supra* note 3.

As 1995 drew to a close, Florida Rural found itself with a case docket that included twenty class actions, seven voting rights cases, and over four thousand clients who were not United States citizens. All these cases, and most representation of the immigrant clients, would be impermissible under the 1996 legislation.<sup>37</sup> In addition, the Florida Rural legislative office in Tallahassee, as well as the impact immigration office in Miami, would have to close.

In other areas, such as the restrictions on welfare reform advocacy and voting rights (redistricting) litigation,<sup>38</sup> the 1996 legislation has taken away from the poor any opportunity for relief in a substantive area of civil justice. In yet others, such as the restriction on claiming attorneys' fees, it has altered the balance of power between attorneys for the poor and attorneys for their opponents. And finally, for those such as ineligible immigrants, the 1996 legislation has eliminated representation entirely.

Florida Rural's attempt to work with its clients, board, staff, unions, and the larger community to develop a plan for referring cases, reducing staff, closing specialty offices, and restructuring itself in this new environment has been documented elsewhere.<sup>39</sup> The discussion here examines the real damage done by some of the newest restrictions, but also the remaining capacity that the restructured legal system for the poor may have to meet the needs of present and future clients.

A major player in the new system is the Florida Bar Foundation which administers Florida's Interest on Trust Accounts (IOTA) program.<sup>40</sup> With the Foundation's support, a "companion delivery system" has been established in an effort to carry on some of the work now pro-

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37. The legislation was ultimately enacted and signed into law on April 26, 1996. Pub. L. No. 104-134 § 504 (1996). For most purposes, the restrictions were effective immediately, although an additional three months were given for divestiture of class actions, prisoner litigation, and immigrant cases. *See id.*

38. Like the prior restriction on the use of LSC and private funds, *see* 45 C.F.R. § 1632 (1998), the 1996 legislation prohibited advocacy related to redistricting and expressly permitted a narrow class of advocacy which, though based on the Voting Rights Act of 1965, 42 U.S.C. § 1971 (1994), did not involve redistricting. However, the significance of the 1996 legislation is that, for the first time, it prohibited such advocacy regardless of the source of funds used to support it.

39. *See* LEGAL SERVICES (newsletter of the Florida legal services programs), Mar.-Apr. 1996, at 2.

40. IOTA or, more commonly, IOLTA (Interest on Lawyers' Trust Accounts), programs are in operation in fifty states and the District of Columbia and use interest from pooled client trust accounts held by attorneys to support various public purposes, including legal services to the poor. Florida's IOTA program was the first in the nation, *see In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978), and is one of the most productive, committing over ten million dollars annually to civil legal services for the poor. However, a recent decision of the U.S. Supreme Court has called the constitutionality of IOLTA programs into question. *See Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925 (1998).

## Legal Services Restrictions

hibited for LSC-funded programs. This system has been described in detail elsewhere.<sup>41</sup>

While empirical data is lacking at this early date, it may fairly be surmised that the companion system has provided the capacity to carry on legislative and administrative advocacy at the state level, some impact work for migrant farmworkers, a number of class actions in general poverty law, and some immigration representation for non-citizens. However, no one would even suggest that the companion system has any chance of filling the gaps created by the 1996 legislation. This reality highlights what may well be the most crippling of the new restrictions: the extension of LSC restrictions to non-LSC dollars. An exploration of that problem follows.

### *A. The Elimination of Voting Rights Cases from the Civil Justice System for the Poor*

One of Florida Rural's most successful collaborations with clients and community groups was its Voting Rights Project which was initiated with a special IOTA grant in 1991. While many of Florida's coastal counties have been desegregated over the last thirty years, discrimination in its crudest forms still pervades many of the inland rural communities. Conditions for minorities in large areas of rural Florida differ little from those that preceded desegregation. One method of maintaining white ascendance is to elect county commissioners and school board members on an at-large basis. In such a system, minorities might comprise forty percent of a county's population but be governed by a county commission consisting of five white members, all elected in county-wide at-large elections.

The Florida Rural Voting Rights Project began in response to frequent client complaints about discrimination and unresponsive government in rural areas. Working with local community people, advocates implemented a litigation strategy that would compel the creation of single-member districts, each of which would elect its own county commissioner. During the first half of the 1990s, they applied this strategy to great effect. Even as the U.S. Supreme Court was deciding cases that limited the impact of the Voting Rights Act on Congressional districts,<sup>42</sup> the Florida Rural strategy continued to secure a string of successes for its rural minority clients.

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41. See LEGAL SERVICES (newsletter of the Florida Legal Services programs), Nov.-Dec. 1995, at 1.

42. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993).

In one typical case, the county's African-American population was concentrated in an unincorporated area immediately adjacent to a sugar cane processing plant. The community to this day is referred to as "Harlem" on official highway maps. Though African Americans comprised seventeen percent of the county's population, an at-large election system had prevented the election of any black representatives to the five-person county commission or to the school board. Due to governmental inattention and poverty, Harlem had the appearance of an impoverished third-world village. When the community did draw the attention of county government, it was to be selected as a candidate for a toxic waste transfer facility. Community concern over the toxic waste proposal and other issues reached a crescendo in 1991. In response, Florida Rural filed suit under the Voting Rights Act of 1965 against the county commission and the school board. Before the end of the year, the county signed a consent decree establishing single member districts.<sup>43</sup> Shortly thereafter, the county's first African-American commissioner was elected from the district that included Harlem. Before the new legislation halted this work,<sup>44</sup> similar results were obtained<sup>45</sup> or were in the process of being obtained in other cases.<sup>46</sup>

Unfortunately, much work remains to be done in securing the rights of Florida's rural minorities to full participation in the democratic process. But Florida Rural now must turn away requests for such assistance. It is anticipated that future requests will also come from Latino and Haitian clients as more of them become part of the electorate. Currently, no one in Florida is doing this work which is highly specialized, quite risky, and expensive. Not confronting this ongoing problem, however, may ultimately prove even more costly.

### *B. The Exclusion of Poor Immigrants from the Civil Justice System*

Another source of pride for Florida Rural has been its legal representation of immigrants. Florida is home to over two million non-citizens,<sup>47</sup> a

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43. See *Jesse Robinson v. Hendry County Bd. of Comm'rs*, Civil Action No. 91-13-CIV-FTM-3A20 (M.D. Fla. 1991), Docket Entry 1309.

44. Through an enormous expenditure of energy, good will, and some dollars, Florida Rural and the ACLU Foundation of Florida made arrangements for the latter to take over and complete the voting rights cases pending when the new legislation took effect. However, there are no plans to initiate new Florida cases, and ACLU counsel in the pending cases have been moved to a regional office in Atlanta, Georgia.

45. See, e.g., *Coleman v. Fort Pierce City Comm'n*, Civil Action No. 92-14157-PAINE (S.D. Fla. 1992) (approving a consent decree that enabled African Americans, who comprised forty-two percent of the local population, to elect two of the five commissioners).

46. See, e.g., *Johnson v. DeSoto County Sch. Bd.*, Civil Action No. 90-366-Civ-FTM-15D (M.D. Fla. 1990).

47. A precise count of this population is not available. In the 1990 census, it was reported

disproportionate number of whom are poor. Although representation of many classes of immigrants had not been permitted with LSC funds since the early 1980s, Florida Rural used IOTA money to offer representation to all immigrants, "no questions asked." Over the years, Florida Rural's racially and ethnically diverse staff, which included twenty-two Spanish speakers and seven Creole speakers, worked with this isolated and vulnerable population. A track record of important impact cases, as well as countless individual service cases, was built in areas such as employment, housing, food stamps, immigration, education law, and farmworker rights. However, when the 1996 legislation applied the LSC alien restriction to IOTA funds, much of this work ended.<sup>48</sup>

The Florida Immigrant Advocacy Center provides high-quality representation to many immigrants who can no longer be served by Florida Rural. However, the wide variety of legal problems experienced by this population not because they are immigrants, but because they are poor, is now going largely unaddressed.<sup>49</sup> Florida Rural can no longer help large numbers of immigrants with their routine civil legal problems. Thus in tying LSC restrictions to non-LSC dollars, the 1996 legislation has left us with a system that responds to immigrants only as immigrants, not as people with the same legal needs as U.S. citizens.

### *C. Further Tipping the Scales of Justice Against the Poor*

The prohibition on recovering attorneys' fees also has dramatically affected the system of civil justice for the poor. The most obvious consequence for legal services programs is loss of revenue. Florida Rural, for example, received in excess of \$2,000,000 in attorneys' fees during the first half of the 1990s and used the money in part to buy a computer system. The 1996 legislation has wiped out this substantial source of support for legal services, appropriately financed by those who engaged in unlawful actions against poor people.

More importantly, the attorneys' fees ban has affected the balance of rights and powers in civil litigation. In the past, parties wishing to bring questionable legal actions against a poor person might be constrained by

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that there were 1,662,601 foreign-born legal immigrants in Florida. U.S. BUREAU OF THE CENSUS, 1990 CENSUS, CP-3-1. This of course would not include undocumented immigrants and those who have overstayed their visas.

48. The 1996 legislation permitted representation of permanent resident aliens (green card holders) and certain other narrow classes of immigrants, but prohibited representation to many aliens legally in this country, including asylum applicants. The legislation also denied representation to "undocumented" aliens. A Florida Rural study, conducted in 1996, came up with an estimate of fifty-seven percent for the Florida migrant farmworker population.

49. Two single-county legal aid programs are attempting to fill this void, but their lack of diverse bilingual staff and the absence of trust with the immigrant community bodes ill for the success of this venture.

the prospect of paying substantial attorneys' fees if they did not prevail. However, with the ban on attorneys' fees, the disincentive to harassing litigation has been removed. An example from Florida Rural's case files illustrates this point.

Rose<sup>50</sup> lived in a public housing project with her two children and her sometimes abusive husband. At one point, she felt the need to obtain a restraining order against her husband and did so on her own. The order prohibited the husband from having any contact with the children. When Rose subsequently allowed him to visit, the housing authority attempted to evict her for "criminal conduct." Florida Rural represented Rose in the eviction and had it dismissed on procedural grounds. Under Florida law,<sup>51</sup> Rose was entitled to attorneys' fees, but under the 1996 legislation Florida Rural was prohibited from seeking them for her. Having lost nothing in the first attempt, the housing authority filed a new eviction action against Rose based on the same facts. This time, the case was resolved on the merits, and Rose again prevailed with the help of Florida Rural. As before, she was entitled to an award of attorneys' fees against the housing authority, but again none could be sought or collected.

Finally, the housing authority brought a third eviction action against Rose, on slightly different facts, at a time when Florida Rural did not have the resources available to represent her. As a result of this war of attrition, Rose and her children were evicted shortly thereafter.

It is impossible to know with certainty whether an award of attorneys' fees against the housing authority in the earlier eviction cases would have produced a more just outcome. However, with an attorney on retainer and a cheap, routine procedure available, the housing authority had reason to persist, whatever the merits of its case, because such persistence cost it virtually nothing and was likely to wear down eventually the opposition. In situations like this, the attorneys' fees restriction will cause the system to suffer more rather than less litigation, almost always to the detriment of the poor.

#### *D. The Problem of Unintended Consequences*

The above-described failures of the system of justice for the poor generally can be described as the intended consequence of the 1996 legislation. However, the implementation of that legislation also has produced a number of arguably unintended consequences that have in-

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50. Florida Bar rules prohibit the use of the client's real name, even though the case is a matter of public record. RULES REGULATING THE FLORIDA BAR, Rules 4-1.6 and 4-1.9(b); Florida Bar Staff Op. 14758 (1990).

51. FLA. STAT. § 83.48 (1998).



creased the hardship of some poor people. One example is the prohibition on representing prisoners in any civil litigation. This restriction was prompted by objections to legal services' representation of prisoners in jail conditions, overcrowding, and other prisoners' rights cases. However, the language of the legislation is so broad that it clearly prohibits representation in any civil case, whatever its nature.

A recent Florida Rural case illustrates the absurd cruelty of this unintended result.

James came to Florida Rural because his home was in foreclosure. James had been rendered a quadriplegic as a result of an industrial accident several years earlier and had used workers' compensation funds to make a substantial down payment on a specially adapted home. He lived there independently for some time, but when resolution of his workers' compensation case was delayed and his income flow interrupted, he fell behind in his mortgage payments. Attempting to catch up, he was duped into refinancing his entire mortgage with an unscrupulous loan company. With a monthly income of \$800 and a new mortgage payment of \$600, he was in foreclosure within three months.

A Florida Rural attorney appeared on his behalf, filed the appropriate defenses and counterclaims, and was preparing for mediation when James was arrested on an unrelated charge. By operation of the restriction on representing prisoners in any litigation, James was to be left without counsel and subject to default judgment by the loan company's attorney. The restriction also precluded a pro bono referral, at least pursuant to Florida Rural's normal practice of paying litigation costs in pro bono cases.

This can hardly be a result intended by the drafters of the 1996 legislation; it is, however, a result that has become part of the system of civil justice for the poor. The 1996 legislation's primary effect—and we believe its intent—was to further limit the meager access that poor people previously had to our system of justice and self-governance. In this particular case, as the Florida Rural attorney was preparing to withdraw, James was able to plead out the criminal case, and was released from jail. Representation thus continued and the foreclosure case is headed toward a favorable outcome. However, the interplay between a minor criminal infraction and the restriction on prisoner representation very nearly resulted in James losing his home to a predatory loan company.<sup>52</sup> The public policy served by this result escapes the authors.

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52. 45 C.F.R. § 1637.4 allows LSC-funded litigation to continue if the client's period of incarceration is expected to last less than three months.

*E. The Response of Legal Services Programs*

Each legal services program faces a clear choice in responding to the restrictions. Will it resign itself to doing the best it can do for individual clients under the restrictions, or will it search for new ways to seek redress against the numerous ingrained, often institutionalized, legal wrongs low-income people encounter? This choice rests on practical decisions about stretching thin resources over a too-large client base rather than on the tired, false dichotomy between "impact" and "service" cases.

Before the 1996 funding reductions, studies in Florida and other states concluded that legal services programs had the resources to meet at most twenty percent of the identified civil legal needs of their client-eligible populations.<sup>53</sup> In response, LSC regulations have for many years required that programs establish priorities and reasonably distribute services over their geographic service areas.<sup>54</sup> The regulations further require that staff, community groups, the private bar, and the client community be involved in formulating priorities with the final decision to be made by a program's board of directors.<sup>55</sup> Thus, legal services programs are required to make regular proactive decisions about how legal services will be rationed.

Florida Rural serves a fourteen-county area that is larger than the three southernmost states of New England and has more than a quarter of a million eligible residents. It receives LSC funding to represent migrant farmworkers throughout the state. Client access to our services might best be served by placing an office in each community we serve. However, our staff of seventy leaves too few employees to place even one advocate, much less an office, in each town. Consequently, a service delivery plan that relies on clients coming individually to an existing legal services office is ineffective and almost certainly will not result in an equal distribution of representation.

Until recently, Florida Rural's response to this problem relied significantly on the "wholesale justice" strategies prohibited by the 1996 legislation. This was because the program's "retail justice" services, such as individual landlord-tenant and public benefits representation, were difficult to access from isolated rural communities. For example, relatively few clients from the town of Arcadia, which is more than sixty miles from any Florida Rural office, have been represented in landlord-tenant or benefits cases, but large segments of the community benefited from two voting

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53. See, e.g., OPENING THE DOORS TO JUSTICE—THE QUEST TO PROVIDE ACCESS FOR THE POOR IN FLORIDA (Report of the Florida Bar-Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent in Florida), Nov. 1991, at 27.

54. See 42 C.F.R. § 1620 (1998).

55. See *id.*

## Legal Services Restrictions

rights cases the program filed against the town and the county and from the class action and subsequent consent decree affecting the large state mental hospital in the town. But the 1996 legislation has forced Florida Rural to look for other strategies to maintain the required balance of services.

### *F. Evolving Strategies*

One strategy is a renewed emphasis on listening to and working with our client community through the representation of both embryonic and full-grown groups.<sup>56</sup> For new groups, initial work simply may involve the preparation of articles of incorporation, bylaws, and board trainings. Even if nothing further is done for the group in the short term, the resulting relationship gives Florida Rural a new set of eyes and ears in the community. The reason for a group's formation may highlight a need that would otherwise be difficult to discover. This approach anticipates that as the group grows, more issues of importance to the community as a whole can be expected to come to light. When the group has matured, it will be able to rely more on its membership. Florida Rural's role will be to provide legal advice and support for the members' chosen actions.

Florida Rural's work with the Coalition of Immokalee Workers (The Coalition) offers one example of this approach. The Coalition is an 800-member, multicultural, community-based organization made up of farm and other low-wage workers. It is centered in Immokalee, Florida, a community created from wilderness as a labor camp. The Coalition's stated purpose is to improve the working conditions and living environment of both its members and their surrounding communities, and it believes that meaningful change will only occur through the efforts of the workers themselves. Florida Rural helped the Coalition incorporate and attain § 501(c)(3) status as a tax-exempt charitable organization and has worked with the group over the past three years as an alternative to Florida Rural's traditional and current representation of individual farmworkers who have experienced job-related problems.

The ongoing representation of the Coalition has led to a close working relationship beneficial to both organizations. It has also improved the lives of many farmworkers in ways that could not have been achieved by a legal services program representing a single client. Workers have successfully campaigned to rein in price-gouging by local merchants by establishing a non-profit food cooperative, eliminated the reported use of

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56. Legal services programs may represent groups that are primarily composed of eligible clients and have no practical means to retain private counsel. See 45 C.F.R. § 1611.5(c) (1998). Legal services programs may not engage in "organizing" a group or coalition, but may provide legal assistance to eligible clients who are engaged in organizing. 45 C.F.R. § 1612.9 (1998).

violence against workers by marching 400-strong to the home of a feared offender, and won a twenty-five percent pay increase for over 450 workers from the area's largest tomato grower through a thirty-day hunger strike that drew national attention.

It is hard to envision how any of these improvements in the lives of farmworkers could have been achieved through individual client representation. The results are primarily due to the Coalition's hard work and strategic planning. Nonetheless, as general counsel, Florida Rural has taken an active, though intentionally backstage, role in its representation. Florida Rural quietly does the Coalition's increasingly complicated corporate work when feasible and recruits outside counsel for matters better handled by specialists. Florida Rural monitored the Coalition's actions during the hunger strike, for example, to insure that the campaign was consistent with the group's corporate and tax-exempt status. By threatening a libel suit at one heated moment during the anti-violence campaign, Florida Rural forced a local newspaper to print a front-page retraction of a derogatory article about the Coalition and also the group's multi-page response. With this approach, as opposed to one based on litigation, the community group conveys its own message.

This approach has produced results that neither Florida Rural nor the Coalition might have achieved independently. An example is the recent conviction of a powerful farm labor recruiter on federal peonage charges. The crew leader and his henchmen had a long history of flagrant mistreatment of farmworker employees, including beatings, rape, shootings, and the stacking of workers in vans for nonstop transportation to South Carolina. Only through the persistent efforts of Florida Rural was the Justice Department persuaded to pursue the case. Even so, without the additional assistance of members of the Coalition in tracking down, interviewing, and gaining the trust of necessary witnesses, the prosecution would have gone nowhere. Instead, both the labor recruiter and his chief henchman received fifteen-year federal sentences.

Complaints from minority children and parents regarding mistreatment and substandard programs in the schools triggered an initiative that teamed Florida Rural with another organization, the National Coalition of Advocates for Students (NCAS), a lay advocacy group based in Boston. Supported by a grant from the John D. and Catherine T. MacArthur Foundation, the project tries to improve the opportunities of minority children in the Palm Beach County public schools. An experienced Florida Rural civil rights attorney conducted an in-depth investigation of that school system, uncovering numerous policies and practices that impeded the education of African American and Latino children. NCAS presented this detailed, written report to the community in May of 1998

## Legal Services Restrictions

and is now working with local parent and community groups and the board of education to promote public discussion of needed reforms.

Another new approach involves technology. Florida Rural has raised money to buy video computers for the four counties served by its Lakeland office. With these machines in place, clients will be able to go to a location in their own community and see and hear a Florida Rural advocate on the other end of the telephone line. The advocate simultaneously will be able to see and hear the client, and, if necessary, will be able to operate the client's computer from the Lakeland office. Through the use of printer/fax machines at each location, documents also will be exchanged. In this way, both clients and advocates will avoid many of the long drives that are currently associated with or totally preclude representation. Increased representation of the most rural clients should, in turn, yield cases that reflect different issues than those the program currently addresses.

The video computers also will give poor people free access to the Internet and a large website to be maintained at Florida Rural's central office. The website will be largely volunteer-run, and will serve as an electronic local newspaper with content in English, Spanish and Haitian Creole. It will provide information and services of specific interest to community groups and the low-income population, including legal education materials and assisted *pro se* court forms. It will provide members of the low-income community a chance to design and operate a website.

Merely by designing this community computer project, Florida Rural has established strong connections with clients and with elements of the community not often thought of as affiliates. A local county government and local libraries, for example, are supporting the project.

### *G. Future Directions*

These new alliances suggest the potential for certain gains that cannot be achieved through a more traditional adversarial approach. The effort is thus an important one. Nonetheless, some adversarial representation is inevitable<sup>57</sup> and poses the specter of future conflicts for Florida Rural.

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57. This kind of conflict is presented more often than one might think. For example, Florida Rural was asked not long ago to represent a discharged African-American employee in a discrimination lawsuit against a local news organization that has consistently supported the rights of the poor in general and the efforts of Florida Rural in particular. Florida Rural undertook the representation and vigorously litigated the case which eventually settled for over \$200,000 and produced specific reforms in the organization's policies. Although relations between Florida Rural and the organization have been strained, its positive editorial bent has not changed. The terms of the settlement prohibit Florida Rural from disclosing the name of the organization.

In another county far removed from the one described above, Florida Rural's application for funds to match a substantial federal grant was recently denied by a 3-2 vote of the county commission. Among the matters discussed at the public hearing were Florida Rural's litigation

Moreover, aggressive litigation of client claims, albeit without attorneys' fees and not as class actions, remains a significant aspect of Florida Rural's mission. Claims against the local power structures, both formal and informal, have always advanced with a "full speed ahead, torpedoes be damned" attitude at Florida Rural, and we have perceived this as a virtue. As the new commitment to making clients part of local decision-making begins to bear fruit, it remains to be seen whether clients and staff will have greater difficulty in finding the right balance between confrontation and cooperation.

It is still too early to calculate the advantages and drawbacks stemming from our renewed effort to integrate Florida Rural into the surrounding community while maintaining our role as a resource for poor people with no other access to representation. In many situations, it may be that we can accomplish as much by collaboration as we did through opposition. But it may be that the conflicts inherent in this approach leave too many poor people without meaningful access to legal representation. A careful and honest examination of these issues will be critical in determining the direction, and value, of legal services programs under the most recent wave of restrictions.

## VI. CONCLUSION

The experiences of legal services lawyers described in this article illustrate how the restrictions and LSC's program integrity regulation impose intolerable burdens on the work done on behalf of legal services clients and potential clients:

- LSC's enforcement of the restrictions in New York has interfered with implementing remedial class action orders.
- LSC has forced lawyers in New York to choose between their clients and their jobs, to endure substantial costs, and to represent clients out of "physically separate" office space despite the harshness inherent in such demands.
- Lawyers in Oregon and Virginia have been forced to waste precious funds to satisfy LSC's program integrity requirement of physical and financial separation.
- Lawyers in Oregon have found that LSC's requirement of physical separation makes it virtually impossible to provide full representation to people living in outlying communities.
- Lawyers in Florida have been forced to cease carrying out crucially important activities, particularly on behalf of immigrants,

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against agribusiness and its former representation of prisoners in the county jail.

prisoners, and Florida citizens denied a meaningful opportunity to vote.

All of these experiences illustrate the need to rescind the restrictions and the need, at the very least, to modify dramatically the program integrity regulation so that the requirement of physical separation does not interfere with vital work and lead to terrible waste. These stories also illustrate the need to investigate further the problems indigent people relying on free legal services encounter so that the full impact of the restrictions and the program integrity regulation can be understood and corrective measures taken.

Courage, passion, and a focused and deliberate effort will be necessary if we are to succeed in obtaining rescission of the restrictions and the program integrity regulation.

First, in an era characterized by relentless attack on legal services programs, the programs' employees—those most likely to confront the impact of the restrictions—are in a vulnerable position. Despite First Amendment protections, they must worry that the mere act of voicing concerns about the restrictions could invite criticism from Congress or LSC. For this reason, many important witnesses may be reluctant to speak out. Nevertheless, it remains crucially important for all of us to speak out.

Second, as time passes, it will become increasingly difficult for LSC-funded programs to recall the details of past legal work. Many senior attorneys have left LSC-funded programs due to imposition of the restrictions and funding cuts. Thus, many of the best witnesses who could describe the work done by legal services programs in the past may not be readily accessible. This makes it all the more important for those who are still involved in legal services to speak out. Those who are now working in other non-LSC programs also should help oppose the restrictions.

Third, because LSC programs operate on such tight budgets, such programs are often unable to send attorneys to conferences like the Liman Colloquium. While the Liman Colloquium was well attended by many of the new organizations that receive foundation, state, and private funds to represent the poor, relatively few LSC-funded lawyers were able to attend, in part because of a lack of time and money. The relative isolation and poverty of lawyers in legal services offices should not be permitted to prevent their voices from being heard about the true impact of the restrictions.

Fourth, the understandable desire to put a happy face on the present situation also threatens to obscure the reality of how legal services function under the restrictions. While new ideas are needed to expand funding for civil legal services and to improve the effectiveness of legal serv-

ices programs, and while these ideas should be fully developed and implemented as appropriate, a focus on new ideas should not inhibit discussion about the true impact of the restrictions and about strategies to obtain their rescission.

Fifth, for accurate reporting about the impact of restrictions to be accurate, programs will need to be candid in describing cases that they both have been unable to pursue and unable to refer. Although the restrictions explicitly prevent programs from handling some cases, and although gaps in service are certain to occur when staff become responsible for referring cases from organization to organization, programs nevertheless have no real incentive to report either gaps in service or the screw-ups and miscommunications that they inevitably cause. Yet the gaps that result from the restrictions and from the pressure to handle cases between "physically separate" locations must be discussed if the picture is to be complete.

Sixth, during the Liman Colloquium, LSC's President, John McKay, said that he considered the LSC restrictions relatively unimportant since LSC's lawyers continue to handle such a huge volume of important cases that are not subject to the restrictions. But such a philosophy conceals the full impact and harmful effect of the restrictions. Before the restrictions, a single class action, legislative encounter, or challenge to a welfare reform statute could have brought greater relief to a larger population than is now possible. Thus, the importance of the work that can still be done, and the volume of such work, should not inhibit accurate reporting about the importance of work that was done in the past, nor should it prevent us from identifying work that should be done.

Finally, as indicated in the examples from New York, Florida, Oregon, and Virginia that are collected here, it is extremely important to tell the full story of the restrictions, even though the story remains difficult to tell. In the end, the legal services programs that demonstrate a commitment both to high-quality representation and to rigorous compliance with the restrictions will make the best case for rescission of the restrictions.